REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 233 of 1998

RHONE POULENC (K) LTD.....PLAINTIFF

VERSUS

VERRA CHEMICALS LTD.....1st DEFENDANT

PAWI ENTERPRISES LTD.....2ND DEFENDANT

TETU KAMUCII UIGUANO AND HARAKA WOMEN LTD.....3RD DEFENDANT

JOHN NGERA WAHATHA.....4TH DEFENDANT

RULING

The application dated October 9, 1998 seeks a summary judgment under Order 35 of theCivil Procedure Rules. It is in a suit in which the claim is for a sum of shs7,150,000 with interestthereon, which sum is said to be a balance due on account of an agreed price for goods sold anddelivered on credit, the said goods being certain specified agricultural chemicals of specifiedquantities and type.

The plaintiff sold, the first defendant purchased the chemicals, and the second, third andfourth defendants signed an instrument of guarantee by which they undertook to pay to theplaintiff on demand by the plaintiff any money which should be due and owing to the plaintiff inrespect of the credit facilities under a charge on two properties of the second and third defendants.

Pursuant to the written agreement and guarantee the plaintiff supplied the goods for whichinvoices were raised, and on various specified dates the first defendant issued in favour of theplaintiff the specified cheques for the various stated sums of money, leaving a balance of the sumnow claimed in the suit. Upon demand by the plaintiff of the sum of the shortfall with accruedinterest on it, the first defendant issued cheques for shs 5, 850,000 in favour of the plaintiff, but ontheir being duly presented tor payment on their due dates, the cheques were dishonoured andmarked by the bank, "Refer to Drawer".

At paragraph 14 of the plaint the plaintiff alleges and argues that notice of dishonour ofthose cheques "is dispensed with in law since the first defendant is the maker of the said cheques";and at paragraph 16, it is stated that demand and notice of intention to sue has been issued, butthat the defendants have refused, neglected or failed to honour the plaintiffs claim; hence, thissuit.

All the four defendants have filed a defence, each one of them separately. The firstdefendant admits the agreement by which the plaintiff was to supply to the first defendant thechemical in question in the agreed quantities; but further pleads that the chemical supplied by theplaintiff was useless, not according to specifications and totally unsuitable for the purpose forwhich the chemical was supplied. The first

defendant avers that the plaintiff perfectly knew thatthe first defendant was purchasing the chemical for the purpose of supplying it to farmers. Uponpassing the chemical to the farmers after receiving it from the plaintiff, the first defendantdiscovered that it had been defrauded by the plaintiff by being supplied with an under-strengthchemical not conforming to specifications, and that the plaintiff did this knowingly. It is the firstdefendant's contention that there was a total failure of consideration and that for this reason, thesuit is unmaintainable; and although it did not counterclaim, the first defendant states that "it is theplaintiff who should refund the money already paid by the first defendant."

The second and third defendants admit having "provided land parcels No 209/12485 and12788 as securities for the goods supplied to the first defendant but deny having guaranteedpayment thereby or undertaking to pay the debts owed to the plaintiff by the first defendant"; andthey add that even if there had been such guarantees or undertakings, those were defective in formand substance and are unenforceable. Denying being indebted to the plaintiff, they jointly promiseto contend during the hearing of this suit, that this action is premature, because no demand hasever been served upon them: a point also taken by the fourth defendant at paragraph 6 of hisseparate defence.

In his written statement of defence the fourth defendant denies entering into any agreementand guarantee with the plaintiff; denies knowledge of whatever might have gone on between theplaintiff and the first defendant (if any); and puts the plaintiff to strict proof of the things theplaintiff alleges in the plaint.

David S Tyrrell, the regional managing director of the plaintiff company swore an affidaviton October 7, 1998 to support the present application. Attached to that affidavit is a photostatcopy of a document shown as dated 21st May 1997. It is headed as an Agreement and Guaranteebetween Rhone Poulenc (K) Ltd and Verra Chemicals Ltd, Pawi Enterprises Ltd, Tetu Kamucii

Uiguano & Haraka Women Ltd, and John Ngera Wahatha. These names correspond to thoseappearing in the pleadings as the names of the parties to this suit and application. The copydocument is marked as exhibit "DST T".

In the light of the denials by the first, second, third and fourth defendants, it appearedproper to examine that document with care. On doing so, it was found to bear what appear to besignatures at pages 5-6, of persons whose names were not written either in the text of thedocument itself or so juxtaposed to the respective signatures as to give the identity of the signatorywhose signature was appended.

The signatures merely appear by titles of office-bearers whose names are not disclosed.There are only titles of "Director" or "Director/Secretary", by each signature. Another significantfeature of that document is that although it was there stated that the document had been "Sealedwith the Common Seal of each respective corporate signatory, the copy exhibited in this courtupon this application does not reveal any seal of any sort. So, arising from the denials of thesecond, third and fourth defendants, if the original document which was not shown to the court onthis application, is also missing these things, then these apparent omissions may as well call forevidence and legal arguments as to the validity of that "Agreement and Guarantee", particularlywith regard to the defendants who are said to be liable as guarantors, and with regard to thesecurities said to have been given under that document.

Although at the hearing of this application the learned advocate for the defendants seems tohave assumed the existence of a properly executed document, and did not point out these apparentomissions, the omissions appear on the face of the record, and they probably produce at least alegal issue as to the adequacy or validity of the document, and being a legal question it is properfor it to be addressed even if parties seem to overlook it or to gloss over it. Perhaps the originaldocument does not have these omissions; but it was not shown to the court, and it is not right forthe court to assume without sight of the document, that all is well with it when the copy of itplaced on the record suggests the contrary which should be explained but was not. As theseaspects go to the root of the claim and they remain unexplained as at this stage, the only occasionstill remaining for the plaintiff to clarify the omissions may be at the summons for directions or atthe trial, and that opportunity may be lost if summary judgment were granted when there is thiscloud of misgivings about a copy of a fundamental document, namely the agreement andguarantee said to have been broken by the defendants.

It is said on behalf of the first defendant that the chemical supplied did not conform tospecifications of what was required, and that after use it did havoc to the crop, and was ineffectiveagainst the coffee berry disease: that the chemical was useless and totally unsuitable for thepurpose for which it was supplied. This allegation is made in the written defence of the firstdefendant (paras 2 and 3), and is maintained in the replying affidavit of John Ngera Wahatha,sworn on November 5, 1998. It said that the chemical supplied had the strength of 39.3% and notof the required 75%.

Now, even if it was taken that the copy of the agreement and guarantee annexed to theaffidavit supporting this application, and relied upon by the plaintiff, is a valid document, properlyexecuted, there are references in that document to a "Chemical known as Daconil 75 WP" (at para(c) on page 2, and para (a) at page 3), as the chemical sold and to be supplied under the agreementand guarantee, on which the plaintiff relies in this suit and application. It is not clear whether thefigure "75" refers to the chemical strength of what was sold and was to be supplied. If it so refers,then then defendant's assertion that the chemical to be supplied was specified seems to besupported. And, if it is so supported, and the first defendant is alleging that what was in factsupplied was a chemical of 39.3% strength, then a question arises as to what chemical the plaintiffdid actually supply.

This question is important; and yet, it cannot be answered in the absence of evidence whichis not before the court at this stage; and it is not the kind of question that can be answered byaffidavit, as the chemistry of these commodities may have to be gone into to ascertain whether"Daconil 75 WP" is what was factually supplied.

On this application the plaintiff has not squarely addressed itself to that question, and it isprobably a question that could not be resolved by lawyers' arguments at the Bar or by affidavit.Faced with the first defendant's allegation that the plaintiff supplied a chemical different from whatwas bought, and was allegedly useless, the plaintiff fell back to the part-payments of the purchaseprice and the unpaid cheques. But the defendant explained that the payments were made before itwas discovered that a wrong chemical had been supplied contrary to specifications.

It needs full hearing and extended argument on the question which arises on the facts ofthis case, whether it is in our law, that if a seller of goods whose efficacy was, or can only be,discovered after they are put to use for the purpose for which they were intended, is paid in partbefore it is discovered that he supplied wrong goods, he can nevertheless insist on full pay for the balance of the purchase price even after discovery of his breach of contract, merely because heholds unpaid cheques from the buyer in respect of the goods. On the other hand, it may turn outthat correct chemicals were supplied, but they were ineffective and useless because they weremisapplied or were not property applied according to manufacturer's instructions manual, or thatthey were ineffective and useless due to pre-utilisation bad storage by the defendant or consumers.In the latter event, the plaintiff may not necessarily have to blame or to be liable for theconsequences.

It was stated for the plaintiff at the hearing of this application that the chemicals agreedupon were supplied. The first defendant says that they were not, because of what has been statedabove. Evidence is required to resolve those assertions and counter assertions. The plaintiff saysthat there is no justification for not paying for the chemicals supplied. The first defendant says thatthere was a failure of consideration. The plaintiff meets that statement by saying that if this wereso, there should have been a counterclaim against the plaintiff. The first defendant replies that acounterclaim is contemplated. Be that as it may, it is not the raising or failure to raise acounterclaim which shall decide whether the plaintiff supplied what was agreed to be supplied.Counterclaim or no counterclaim, the question still remains, whether there is any justification ofthe defendants withholding further payments to the plaintiff. And in the light of the pleadings, thatis a fundamental question on which evidence must be led for both parties. And absence of acounterclaim does not necessarily erase that question.

As for the defendant guarantors, there is a real dispute as to service of notice that there hadbeen default or failure in payment; and at paragraph 14 of the plaint there is the clear statementthat notice of dishonour of the cheques "is dispensed with in law", while in the oral presentation atthe Bar during the hearing of this application an attempt was made to show that service waseffected at the last known address of the

defendants - an allegation denied. Whether there wasservice or not, and whether service was required or could be dispensed with, are questions fordetermination at the trial.

When a seller says that he delivered the goods sold, and the buyer replies that "Yes, youdelivered goods, but they were not the ones I had specified to you, and I did not discover this factuntil after I had made some payments under a mistaken belief that I had received what I bought,and after what you delivered was used but found bad and useless", it is surely a serious question asto whether the right goods were supplied as per specifications; whether there were specifications;

whether the buyer ought to have discovered the nature of the goods supplied before their use orpart payment for them.

And when the guarantors say that their liability is secondary to that of the buyer who mustbe shown to be liable in the first place, and that they ought to be served with a notice of default butthey were not; and the seller says that circumstances exist such that notice of dishonour of thecheques is dispensed with in law, and such circumstances are not yet placed before the court, andat the same time almost in the same breath he says that service was effected, which the guarantorsdeny, the court ought to allow the parties a fair opportunity for each of the adversaries to fullyventilate its standpoint which is disputed by his opposite number.

These are not light questions. The law is not settled on any of the points taken by eitherside. Facts are not overwhelming on either side.

I have considered the authorities cited to me. For instance in *Kinuthia* v *Kenya NationalCapital Corporation,* Civ App 51 of 1992, at Nairobi, the defendant did not plead forgery but onan application for summary judgment the defendant filed an affidavit in opposition, and in italleged forgery; and the Court of Appeal found nearly all the documents binding against thedefendant to carry the defendant's signatures which all resembled, upon which the court concludedthat the late allegation of forgery was, in the circumstances an afterthought, and as the documentswere properly executed and the signatures thereon were not forgeries, the belated plea of forgerycould not be a defence. As to the allegation that fraud had been committed by the plaintiff bydelivering a vehicle quite different from the one the defendant had contracted to purchase, thecourt rejected it summarily because the defendant was found to have signed all the documents, andthe documents showed the relevant particulars of the same vehicle the defendant had takendelivery of and used. As other matters were not pleaded in the defence, they were irrelevant. Inthe result, no triable issues were found to have been raised and summary judgment was justified.

This is not the case in the instant case. Fraud was pleaded and particularised in the defencein this case, and the document relied on by the plaintiff seems not be as unassailable as were thedocuments in the *Kinuthia* case. In the *Kinuthia* case the goods sold and delivered correspondedwith what the documents specified and no serious dispute arose about them. In the instant casechemicals of different strengths are alleged by the opposing parties, and it is not clear as to whichones were actually supplied. So, *Kinuthia's* case was decided on tacts materially distinguishablefrom those present in the instant case.

Bank of Baroda (K) Ltd v Atlas Automobilies Ltd, Civ Applic 35 of 1995, Nairobi,concerned an application for a stay of execution of a judgment. The principles set out in that caseare on stay of execution under Rule 5(2) (b) of the Court of Appeal Rules, 1972. Although forpurposes of deciding whether the intended appeal was arguable or prima facie, the courtconsidered the pleadings and evidence, the court was careful to state that it was not at that stagepurporting to determine the intended appeal. So, it cannot be said on the basis of that ruling thatthe defence was a sham and raised no triable issue. It is not said that on appeal the courteventually found this to be the case. So that case is not helpful on the present application.Whatever was said there on the viability or otherwise of the defence was tentative only, awaitingthe appeal itself.

In our system of civil justice trial, as a rule, must precede judgment. So the procedure byway of summary judgment in certain cases is extraordinary. The idea behind this procedure is toprevent delay in cases where there is no defence - cases where the plaintiff shows to thesatisfaction of the court, that he has a

clear case against the defendant which the defendant cannotanswer; that his case is too plain for argument; that the defendant's pleas are put in simply for thepurpose of delay which only adds to expense, and are not in aid of justice. The idea is to preventsham defences from defeating the rights of parties by delay and causing great loss to plaintiffsendeavouring to enforce their obvious rights.

We all know that in times of relatively high interest rates and economic hardships, theremay be a strong incentive to a defendant who has cash-flow problems to keep his creditor waiting,and either to pay as little as possible, as irregularly as possible, and as late as possible, or not to payat all, rather than borrow money to pay off the debt at a commercial rate of interest from a bank orfinance house. It may even take delivery of goods and then dishonour the cheque or other bill ofexchange on some spurious pretext that the goods were faulty. The plaintiff would then be drivento prosecute a full-scale litigation to trial, and shortly before the case is called, the defendant mayoffer to settle. He has achieved his objective, namely, an interest-free period of credit. This orsimilar case, is the kind of situation that the summary procedure under Order 35 aims to deal with.Instead of a trial first and then judgment, judgment is given at once and no trial is required. Thereis no defence, so why hold a trial?

As soon as there is a triable question which is not a pretended counterfeit simulation of adefence, it must be tried without unfair conditions on the defendant. As soon as there is a shadowy question of fact or law, conditional leave to defend must be given and the matter mustreach a trial. As soon as a sham facade is discovered, it is thrown out and judgment entered forthe plaintiff at once. What do you tarry and linger for when there is no defence to really speak of?

In the light of the difficulties which I have set out in the earlier part of this ruling, theseparate defences filed in this case cannot be aid to be counterfeits. They raise some triable issues,and it would startle me to think that in a case of this sort an order should be made, the effect ofwhich would be that the defendants are not heard at all to make their defences unconditionally.Issues of fact are there. Issues of law arise. They are not of the type that are resolvable withoutevidence and complex argument on the law and principle at a plenary trial. It is for these reasonsthat I dismiss this application as I hereby do, and allow the defendants unconditional leave todefend, as I hereby do.

In the circumstances of this application this is a proper case in which the costs of theapplication should abide the event and be costs in the cause. I so order.

Signed and dated by me at Nairobi this 10th day of February, 1999.

R KULOBA

JUDGE